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15 UNITED STATES DISTRICT COURT

16 FOR THE CENTRAL DISTRICT OF CALIFORNIA

17 UNITED STATES OF AMERICA,

18 Plaintiff,

19 v.

20 JERRY NEHL BOYLAN,

21 Defendant.

No. CR 22-482-GW

GOVERNMENT'S MOTION *IN LIMINE* TO
EXCLUDE EVIDENCE OR ARGUMENT
RELATING TO REVISIONS TO COAST
GUARD REGULATIONS AFTER SEPTEMBER
2, 2019

Hearing Date: Oct. 12, 2023
Hearing Time: 8:00 a.m.
Place: Courtroom 9D

24 Plaintiff United States of America, by and through its counsel
25 of record, the United States Attorney for the Central District of
26 California and Assistant United States Attorneys Mark A. Williams,
27 Matthew W. O'Brien, Brian R. Faerstein, and Juan M. Rodriguez, hereby
28 moves in limine to exclude any evidence or argument relating to Coast

1 Guard regulation revisions considered and/or implemented after
2 September 2, 2019.

3 This Motion is based upon the attached memorandum of points and
4 authorities, the files and records in this case, and such further
5 evidence and argument as the Court may permit.

6
7 Dated: September 14, 2023

Respectfully submitted,

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12 /s/

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The *Conception* fire occurred on September 2, 2019. In an effort
4 to strengthen preexisting safety requirements so as to safeguard
5 against a similar catastrophe in the future, after September 2019 the
6 Coast Guard implemented new (and modified existing) regulations
7 through its rulemaking process. The Coast Guard's important work
8 should not -- and may not -- be weaponized in the context of this
9 criminal prosecution. The Coast Guard's efforts after the fire to
10 amend its regulations are irrelevant to whether defendant JERRY NEHL
11 BOYLAN ("defendant") failed to follow the regulations in place on
12 September 2, 2019.

13 Pursuant to Federal Rules of Evidence 401-403 and 407, the
14 government moves in limine to exclude any evidence or argument
15 relating to revisions to Title 46, Code of Federal Regulations,
16 Subchapter T and K that were made or contemplated, or recommended to
17 the Coast Guard by any person or entity (including the National
18 Transportation Safety Board ("NTSB")), after the *Conception* fire.

19 The Coast Guard's rulemaking and administrative actions after
20 the fire have no relevance to defendant's conduct before and during
21 the fire. Even if such evidence were relevant (it is not), any
22 probative value would be minimal and substantially outweighed by the
23 danger that the evidence would cause unfair prejudice, confuse the
24 issues, mislead the jury, cause undue delay, and waste time.

25 Moreover, Rule 407 bars the introduction of subsequent remedial
26 measures (in this case, on the part of the Coast Guard) to establish
27 a party's liability or culpability. The Court should not allow the
28

1 defense to shift blame at trial from defendant's gross negligence to
2 alleged infirmities in the Coast Guard's regulatory scheme.

3 **II. RELEVANT BACKGROUND**

4 Title 46, Code of Federal Regulations Subchapter T, governs the
5 construction, outfitting, and operation of small passenger vessels,
6 including the *Conception*, that are under 100 gross tons and carry 150
7 or fewer passengers or have overnight accommodations for 49 or fewer
8 passengers. Following the *Conception* fire, the Coast Guard
9 considered and implemented new, and modified existing, regulations
10 through its rulemaking process. While the regulations cited in the
11 indictment pertaining to the night watch requirement and the
12 requirement of the crew having fire safety training and drills were
13 modified, none of the language in the regulations in effect at the
14 time of the *Conception* disaster was altered. Instead, the Coast
15 Guard added to the existing provisions of those regulations, as well
16 as to other regulations pertaining to fire suppression, egress, and
17 hazardous items, to make them more stringent.¹

18 **III. ARGUMENT**

19 **A. Evidence That the Coast Guard Revised Its Regulations After** 20 **September 2, 2019 Is Inadmissible Under Rules 401, 402, and** 21 **403**

22 **1. Evidence Regarding Regulatory Changes After the** **Conception Fire Is Irrelevant**

23 Evidence or argument relating to modifications, or recommended
24 changes, to the Coast Guard regulations after the *Conception* fire
25 have no relevance to defendant's failure to follow numerous
26 regulations and requirements before and during the fire.

27
28 ¹ A summary of the changes can be found in the Federal Register.
(Table 1, <https://www.govinfo.gov/content/pkg/FR-2021-12-27/pdf/2021-27549.pdf>).

1 Evidence regarding traditional administrative actions taken or
2 considered by the Coast Guard after the fire has no "tendency to make
3 a fact more or less probable than it would be without the evidence"
4 relating to defendant's misconduct prior to and during the fire.
5 Fed. R. Evid. 401. Nor are any facts about the Coast Guard's
6 regulatory functions after the fire "of consequence in determining
7 the action." Id. Any such evidence fails both requirements of the
8 conjunctive test of Rule 401, and thus is inadmissible under Rule
9 402.

10 In particular, if the jury hears evidence that defendant
11 deviated from his duties or from the Coast Guard regulations, the
12 jury may consider that evidence in concluding that defendant was
13 grossly negligent. This question depends on the Coast Guard
14 regulations in place as of September 2, 2019, not any subsequent
15 modifications. The only possible relevance of subsequent
16 modifications would be to somehow paint the Coast Guard as being
17 responsible for defendant's gross negligence based on the Coast
18 Guard's subsequent remedial measures, which, as discussed below, is
19 not a proper purpose for such evidence. The Court thus should
20 preclude evidence or argument regarding the Coast Guard's regulatory
21 actions after the *Conception* fire on this basis alone.

22 2. Evidence Regarding Regulatory Changes After the
23 *Conception* Fire Is Barred Under Rule 403

24 Even if there was any permissible relevance to the post hoc
25 modifications to the Coast Guard regulations (there is none), such
26 evidence would be only minimally probative to the question of whether
27 defendant was grossly negligent in ignoring the regulations in place
28

1 as of September 2, 2019 in the lead-up to and during the *Conception's*
2 final voyage.

3 The process of the Coast Guard modifying certain provisions and
4 regulations are irrelevant to defendant's upcoming trial.
5 Modifications to Coast Guard regulations do not mean that the old
6 regulations were unclear, or that they sanctioned defendant's
7 conduct. Defendant is free to argue that he did not understand
8 certain regulations or did not think they were important. But later
9 changes to those regulations have no probative value to the issue of
10 his disregard of the regulations.

11 Permitting such evidence or argument would unfairly prejudice
12 the government by allowing defendant to seek to influence and nullify
13 the jury through illegitimate means. Evidence or argument about
14 revisions to the regulations would prompt the jury to draw the
15 unfairly prejudicial (and incorrect) inference that these revisions
16 were tantamount to a concession by the Coast Guard that the
17 defendant's conduct complied with the regulations in place at the
18 time of the *Conception* fire. They did not.

19 The defense also may seek to cast aspersions at the Coast Guard
20 for actions it took after the *Conception* disaster, seeking to blame
21 the Coast Guard for the deaths of the 34 victims. Indeed, in their
22 recent motion seeking special jury selection procedures, the defense
23 pointed to the Coast Guard's purported failure to previously
24 "implement safety recommendations from the NTSB." (Dkt. 95 at 3.)
25 Such argument serves no purpose but to unfairly sway the jury that
26 the Coast Guard is at fault based on actions it took after the fire,
27 and therefore the Coast Guard, and not the defendant, should be on
28 trial. This is an improper basis, under Rule 403, for seeking to

1 admit evidence, as it has "an undue tendency to suggest decision on
2 an improper basis, commonly, though not necessarily, an emotional
3 one." United States v. Pac. Gas & Elec. Co., 178 F. Supp. 3d 927,
4 941 (N.D. Cal. 2016) (citing Old Chief v. United States, 519 U.S.
5 172, 180 (1997)). Moreover, the Coast Guard's rulemaking function is
6 not probative of any purported fault in the matter in any event. See
7 Columbia & P. S. R. Co. v. Hawthorne, 144 U.S. 202, 207 (1892) ("the
8 taking of such precautions against the future is not to be construed
9 as an admission of responsibility for the past," and "has no
10 legitimate tendency to prove that the [party] had been negligent
11 before the accident happened").

12 Similarly, evidence or argument regarding the Coast Guard's
13 regulatory changes also substantially risks confusing the issues and
14 misleading the jury. The issue is not what the Coast Guard
15 regulations could have required in September 2019, or what they
16 require now. The issue is what the Coast Guard regulations required
17 as of September 2019, and whether defendant was grossly negligent in
18 repeatedly ignoring those requirements. Regulatory changes after
19 September 2019 have nothing to do with defendant's state of mind,
20 misconduct, and inattention to duties before and during the fire.
21 Whether the regulations in September 2019 were adequate, or whether
22 the regulations should have been worded differently, are issues that
23 would mislead and confuse the jury.

24 Finally, admitting this evidence would not be in the interests
25 of judicial economy, and would unduly prolong the trial. If the
26 defense were permitted to inject irrelevant issues about the Coast
27 Guard's regulatory actions following the fire, including complex
28 issues regarding agency rulemaking, the government would have to

1 explain what changes the Coast Guard made, the impetus for each
 2 change, how the changes were formulated and vetted, and why each
 3 change has no bearing on defendant's criminal liability. The
 4 introduction of this complicated evidence by both sides would waste
 5 the jury's time.

6 **B. Rule 407 Further Underscores That Evidence Regarding**
 7 **Revisions to the Coast Guard Regulations After September**
 8 **2019 Is Inadmissible**

9 Rule 407 prohibits the introduction of subsequent remedial
 10 measures to demonstrate liability. Specifically, Rule 407 states, in
 11 relevant part, that "[w]hen measures are taken that would have made
 12 an earlier injury or harm less likely to occur, evidence of the
 13 subsequent measures is not admissible to prove...negligence [or]
 14 culpable conduct...." Fed. R. Evid. 407; see also Boeing Airplane
 15 Co. v. Brown, 291 F.2d 310, 315 (9th Cir. 1961) (subsequent remedial
 16 measures are inadmissible with regard to the issue of prior
 17 negligence). Rule 407 primarily serves the policy purpose of
 18 encouraging parties to implement changes to safety measures without
 19 fear that such "change-in-policy" evidence will later be used in a
 20 legal proceeding. See Gauthier v. AMF, Inc., 788 F.2d 634, 637 (9th
 21 Cir. 1986) (purpose of the rule is to encourage parties to improve
 22 safety "conditions without fear that subsequent measures will be used
 23 as evidence against them"); Fed. R. Evid. 407, adv. comm. notes 1972
 24 ("The courts have applied this principle to exclude evidence of
 25 subsequent repairs, installation of safety devices, changes in
 26 company rules, and discharge of employees.") (emphasis added).

26 1. Rule 407 Applies in Criminal Cases

27 While Rule 407 most often arises in the civil context, it
 28 applies to criminal cases where conduct amounting to a subsequent

1 remedial measure may not be offered as substantive evidence against a
2 party to show culpability. For example, in United States v. Pacific
3 Gas & Electric Company, a district court within the Ninth Circuit
4 analyzed the underlying rationale of Rule 407 and recognized that
5 while the rule "may more often find application in civil cases,
6 'neither harm nor injury are exclusively civil matters.'" Pac. Gas &
7 Elec. Co., 178 F. Supp. 3d at 951 (quoting United States v. DSD
8 Shipping, A.S., No. 15-102-CG-B, 2015 WL 5722805, at *1 (S.D. Ala.
9 Sept. 29, 2015)). The court found that the purpose of Rule 407
10 "applies with equal force to civil and criminal cases" and thus "that
11 Rule 407's bar of subsequent remedial measures can apply to criminal
12 cases and may apply to this one."² Id.

13 Unlike the typical case in which the plaintiff seeks to
14 introduce evidence of a defendant's subsequent remedial measures to
15 show defendant's civil liability, defendant here may seek to
16 introduce evidence of the Coast Guard's subsequent remedial measures
17 to shift responsibility and somehow negate his own criminal
18 liability.³ The principles of Rule 407 should apply with equal force
19 in this criminal case in precluding the defense from seeking to
20 attribute blame to the Coast Guard for regulatory modifications it
21 made after the *Conception* fire.

24 ² In so concluding, the district court recognized there appeared
25 to be no binding authority on the question of Rule 407's application
26 to criminal cases and disagreed with district courts outside of the
Ninth Circuit that had reached the contrary conclusion. Pac. Gas &
Elec. Co., 178 F. Supp. 3d at 951.

27 ³ To be clear, by invoking Rule 407 here, the government is
28 neither asserting nor acknowledging that the modifications that the
Coast Guard implemented after the fire would have made defendant's
gross negligence any less likely.

2. The Purposes Underlying Rule 407 Show Why the Coast Guard's Remedial Changes Are Inadmissible

Rule 407 prohibits the defense from seeking to cast the Coast Guard's regulatory revisions as some sort of an acknowledgment that the changes could have made the "earlier injury or harm [of the *Conception* fire] less likely to occur." Fed. R. Evid. 407. The inadmissibility of the Coast Guard's post-fire actions under Rule 407 crystallizes the lack of relevance of this evidence under Rules 401 and 402 as well as its minimal probative value and danger of confusing the issues, misleading the jury, wasting time, and unfairly prejudicing the government under Rule 403. Indeed, Rule 407 constitutes one of the "concrete applications" of Rule 403's balancing test, and reflects that subsequent remedial measures rarely warrant admission under Rule 403. See Fed. R. Evid. 403, adv. comm. Notes 1972; see also 23 Charles Alan Wright, Arthur R. Miller & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5282 (2d ed. 2023 update) ("[S]uch evidence is irrelevant or has such minimal probative value that the costs of admitting such evidence outweigh the benefits.").

Here, the rationale of Rule 407 reflects that the probative value of such subsequent measures is slight compared to the danger of unfair prejudice and other concerns identified above under Rule 403, and that admitting such evidence or argument may discourage government entities which promulgate rules from revisiting their regulations. See, e.g., Luera v. Snyder, 599 F.Supp. 1459, 1463 (D. Colo. 1984) (testimony regarding police department's subsequent remedial measures was inadmissible) cited with approval in Maddox v. City of Los Angeles, 792 F.2d 1408, 1417 (9th Cir. 1986).

1 The public should expect that the Coast Guard would evaluate
2 and, where appropriate, make modifications to its regulations
3 following a catastrophic event such as the *Conception* fire. But “the
4 taking of such precautions against the future is not to be construed
5 as an admission of responsibility for the past, has no legitimate
6 tendency to prove that the [party] had been negligent before the
7 accident happened, and is calculated to distract the minds of the
8 jury from the real issue, and to create a prejudice against [that
9 party].” Hawthorne, 144 U.S. at 207.

10 There are two basic rationales for Rule 407’s exclusion of
11 subsequent remedial measures. First, the Rule reflects the drafters’
12 judgment that the probative value of such evidence is extremely
13 slight compared to the potential for unfair prejudice.

14 Second, the Rule is based on “a social policy of encouraging
15 people to take, or at least not discouraging them from taking, steps
16 in furtherance of added safety” after a victim suffers harm. Fed. R.
17 Evid. 407, adv. comm. notes. Because parties may fear the evidential
18 use of such acts in litigation, admitting such evidence would make it
19 less likely that individuals or entities will take remedial action.

20 While Rule 407 provides for certain limited exceptions, none of
21 those exceptions apply here. Rule 407 permits the introduction of
22 subsequent remedial measures for only limited purposes, including
23 “proving ownership, control, or feasibility of precautionary
24 measures.” Fed. R. Evid. 407. This case, however, does not
25 implicate any questions of ownership or control. And this case is
26 not about whether the Coast Guard could have taken additional steps
27 to somehow remedy defendant’s intentional neglect of longstanding
28

1 Coast Guard regulatory requirements; it is about whether defendant
2 violated 18 U.S.C. § 1115 in September 2019.

3 This Court, however, does not need to decide whether Rule 407
4 independently bars the admission of this evidence. Because Rule 407
5 is just a “concrete application[]” of Rule 403’s balancing test of
6 probative value versus the dangers Rule 403 identifies, Fed. R. Evid.
7 403, adv. comm. notes, the Court can exclude this evidence under Rule
8 403 (or, just as appropriately, under Rules 401 and 402) as well.

9 **IV. CONCLUSION**

10 For the foregoing reasons, the government respectfully requests
11 that the Court grant this motion and exclude any evidence or argument
12 about modifications to the Coast Guard regulations that were made or
13 contemplated, or recommended to the Coast Guard by any person or
14 entity, after September 2, 2019.